

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PATTI J. MCKAY,
Plaintiff,
vs.
MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

Civil No. 06-3093-AA
OPINION AND ORDER

Arthur W. Stevens III
Black, Chapman, Webber, Stevens,
Petersen & Lundblade
221 Stewart Ave., Ste. 209
Medford, Oregon 97501
Attorney for plaintiff

Karin Immergut
United States Attorney
District of Oregon
Neil Evans
Assistant United States Attorney
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Leisa A. Wolf
Special Assistant U.S. Attorney
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
Attorneys for defendant

AIKEN, Judge:

Claimant, Patti J. McKay, brings this action pursuant to

1 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
2 1383(c)(3), to obtain judicial review of a final decision of the
3 Commissioner denying her application for disability insurance
4 benefits under Title II of the Act and for Supplemental Security
5 Income (SSI) disability benefits under Title XVI of the Act. For
6 the reasons set forth below, the Commissioner's decision is
7 reversed and this case is remanded for additional proceedings.

8 **PROCEDURAL BACKGROUND**

9 Plaintiff protectively filed her applications for benefits
10 on May 5, 1999. Tr. 113-15. Plaintiff's application was denied
11 initially and on reconsideration. On May 2, 2001, plaintiff
12 appeared with counsel for a hearing before a Administrative Law
13 Judge (ALJ). Tr. 42-86. The ALJ left the record open in order
14 to gather further medical and vocational information. Tr. 80-86.
15 On July 19, 2001, the ALJ issued a decision in which he held that
16 plaintiff was not disabled. Tr. 15-28. On November 14, 2002,
17 the Appeals Council denied plaintiff's request for review, tr. 7-
18 9, making the ALJ's decision the final agency decision. See 20
19 C.F.R. §§ 416.1481, 422.210.

20 On July 14, 2003, this court reversed and remanded for
21 further administrative proceedings pursuant to Sentence 4 of 42
22 U.S.C. § 405(g), based on the parties' stipulation. Tr. 607-08.
23 On September 27, 2003, a Social Security Administrative Appeals
24 Judge issued an Order of the Appeals Council vacating the July
25 19, 2001, Decision and remanding the case to an ALJ for further
26 proceedings consistent with the order of the court. Tr. 609-10.

27 After remand hearings on August 3, 2005, and January 9,
28 2006, on July 19, 2006, the ALJ issued a decision finding

1 plaintiff not disabled. Tr. 565-576. Plaintiff files the appeal
2 at bar.

3 **STATEMENT OF THE FACTS**

4 Plaintiff was 40 years old at the final hearing before the
5 ALJ. Tr. 568. Plaintiff obtained a high school education and
6 enrolled in several community colleges earning 20 academic
7 credits toward an Associate's Degree with a cumulative grade
8 point average of 3.0. Id. Plaintiff has past relevant work
9 experience as a retail clerk, office clerk, mail order customer
10 clerk/telemarketer, and day care provider. Tr. 567-68.

11 **STANDARD OF REVIEW**

12 This court must affirm the Secretary's decision if it is
13 based on proper legal standards and the findings are supported by
14 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
15 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
16 mere scintilla. It means such relevant evidence as a reasonable
17 mind might accept as adequate to support a conclusion."
18 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
19 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
20 The court must weigh "both the evidence that supports and
21 detracts from the Secretary's conclusions." Martinez v. Heckler,
22 807 F.2d 771, 772 (9th Cir. 1986).

23 The initial burden of proof rests upon the claimant to
24 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
25 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
26 an "inability to engage in any substantial gainful activity by
27 reason of any medically determinable physical or mental
28 impairment which can be expected . . . to last for a continuous

1 period of not less than 12 months. . . ." 42 U.S.C.
2 § 423(d)(1)(A).

3 The Secretary has established a five-step sequential
4 process for determining whether a person is disabled. Bowen v.
5 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
6 416.920. First the Secretary determines whether a claimant is
7 engaged in "substantial gainful activity." If so, the claimant
8 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
9 §§ 404.1520(b), 416.920(b).

10 In step two the Secretary determines whether the claimant
11 has a "medically severe impairment or combination of
12 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
13 §§ 404.1520(c), 416.920(c). If not, the claimant is not
14 disabled.

15 In step three the Secretary determines whether the
16 impairment meets or equals "one of a number of listed impairments
17 that the Secretary acknowledges are so severe as to preclude
18 substantial gainful activity." Id.; see 20 C.F.R.
19 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
20 presumed disabled; if not, the Secretary proceeds to step four.
21 Yuckert, 482 U.S. at 141.

22 In step four the Secretary determines whether the claimant
23 can still perform "past relevant work." 20 C.F.R.
24 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
25 disabled. If she cannot perform past relevant work, the burden
26 shifts to the Secretary. In step five, the Secretary must
27 establish that the claimant can perform other work. Yuckert, 482
28 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &

(f). If the Secretary meets this burden and proves that the claimant is able to perform other work which exists in the national economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

DISCUSSION

At step one of the five step sequential evaluation process outlined above, the ALJ found that plaintiff may have engaged in substantial gainful activity during the time period considered, however, a conclusive determination could not be made based on the record. Tr. 568, Finding 2. This finding is not in dispute. At step two, the ALJ found that plaintiff had the following severe impairments: obesity; chondromalacia patella; degenerative joint disease; patellar femoral syndrome in the right knee; gastroesophageal reflux disease; a hiatal hernia; and a history of both plantar fascitis and reactive airway disease. Tr. 568, Finding 3. This finding is in dispute. At step three, the ALJ found that plaintiff's impairments, severe and not severe, singularly and in combination, did not meet or equal the requirements of a listed impairment. Tr. 571, Finding 4. This finding is not in dispute.

The ALJ determined that plaintiff had the residual functional capacity (RFC) to perform medium exertional work, lifting fifty pounds occasionally, and twenty-five pounds frequently. Plaintiff can stand and/or walk no more than six hours in an eight hour workday with ordinary breaks. Plaintiff is limited to occasional balancing and must avoid climbing ramps, stairs, ladders, scaffolds, kneeling, crouching, and crawling. She cannot work with "dangerous hazards" and should not work

1 bent over for prolonged periods of time. Tr. 571, Finding 5.
2 This determination is not in dispute.

3 At step four, the ALJ found that plaintiff could perform
4 her past relevant work as a retail clerk, office clerk and mail
5 order customer clerk. Tr. 575, Finding 6. This finding is in
6 dispute. Finally, the ALJ found that plaintiff was not disabled.

7 The ALJ alternatively requested the vocational expert (VE)
8 to assume that plaintiff could not perform past relevant work and
9 asked whether she could perform other jobs existing in the
10 national economy. The VE testified that plaintiff could perform
11 the jobs of hand packer, table worker, office helper and
12 addresser clerk; all jobs existing in sufficient number in the
13 national economy. Tr. 575, Finding 7.

14 Need for Additional Proceedings

15 Plaintiff moves, in the alternative, to reverse and remand
16 this case for additional proceedings. Defendant argues that if
17 the court is unable to find plaintiff "not disabled," then the
18 court should "reverse and remand this case for further vocational
19 expert testimony to explain the deviation." Defendant's Brief,
20 p. 12. The court agrees that remand for additional proceedings
21 is appropriate.

22 This court initially remanded this case for additional
23 proceedings. Tr. 607-08. The Remand Order directed the parties
24 to:

25 Reevaluate the functional limitations arising from
26 Plaintiff's impairments and the severity of those
27 impairments;

28 Reevaluate the medical evidence and, if necessary,
29 re-contact medical sources for more clarification
30 and obtain a consultative medical evaluation and

1 medical expert testimony; and

2 Reevaluate Plaintiff's residual functional
3 capacity for work activities in light of all
4 of the evidence and obtain vocational expert
5 testimony to clarify the affect of the
6 assessed limitations on the available
7 occupational base.

8 Tr. 608.

9 "An ALJ's duty to develop the record further is triggered
10 only when there is ambiguous evidence or when the record is
11 inadequate to allow for proper evaluation of the evidence. Mayes
12 v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001) (internal
13 citation omitted). Here, the Remand Order directed the ALJ to
14 re-evaluate the medical evidence, and if necessary, re-contact
15 medical sources for further clarification, and obtain a
16 consultative medical evaluation and medical expert testimony.
17 Tr. 608. The ALJ did, in fact, obtain two consultative
18 examinations from Kevin Sullivan, M.D., and Kurt Brewster, M.D.
19 Tr. 630-37, 671-702. The ALJ also obtained expert medical
20 testimony from Dr. Goodman, who reviewed the medical record. Tr.
21 733-57.

22 The ALJ erred, however, in failing to re-contact
23 plaintiff's treating physicians to resolve the ambiguity which
24 exists regarding the severity of plaintiff's gastroesophageal
25 reflux disease (GERD), her symptomatic vomiting, and the outcome
26 of plaintiff's treating physicians' plan to refer plaintiff to a
27 gastrointestinal specialist. I find the record here is inadequate
28 to allow for proper evaluation of the evidence; and I further
 find that the evidence is ambiguous. Therefore, the ALJ is
 directed to re-contact Drs. Mullarkey, Kolo and Deatherage for

clarification and to obtain additional information on these issues. The non-examining physicians contacted by the ALJ failed to adequately address the issue of plaintiff's GERD and vomiting episodes. The non-examining physicians failed to address whether plaintiff's vomiting episodes are persistent, chronic and debilitating and reasonably related to her medical impairments, specifically as to the severity and frequency alleged by plaintiff and supported at least in part by the record. If the ALJ finds conflicting medical evidence, then the ALJ may reject the opinions and evidence of plaintiff's treating physicians' by providing "specific and legitimate reasons" supported by substantial evidence in the record. Holohan v. Massanari, 246 F.3d 1195, 1203 (9th Cir. 2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996).

Finally, based on the results of additional evidence gathered from plaintiff's treating physicians, the ALJ may need to re-contact the VE to present a hypothetical that accurately reflects plaintiff's condition and limitations.

CONCLUSION

20 The Commissioner's decision is reversed and remanded for
21 additional proceedings.

22 IT IS SO ORDERED.

23 Dated this 25 day of October 2007.

27 _____ /s/ Ann Aiken
28 Ann Aiken
United States District Judge